Supreme Court, U.S.
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No. 92-1111

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

THE CITY OF CINCINNATI AND
BOARD OF TRUSTEES RETIREMENT
SYSTEM AND SCOTT JOHNSON,

Petitioners,

vs.

THE CITY OF CINCINNATI, ex rel.
DAVID KUNTZ AND DAVID KUNTZ,

Respondents.

ON PETITION FOR WRIT OF
CERTIORARI TO THE
SUPREME COURT OF THE
STATE OF OHIO

RESPONDENT'S BRIEF IN OPPOSITION

Respectfully submitted,

Andrew S. Lipton, Esq.
(Counsel of Record)
Manley, Burke, Fischer & Lipton
225 West Court Street
Cincinnati, Ohio 45202
(513) 721-5525

Attorney for Respondent

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To fashion their issues for review, petitioners misstate the record and distort the law. At best, the issue raised by petitioners is whether the facts of this case satisfy the test set out by this Court in Maher v. Gagne, 448 U.S. 122 (1980) which the Court of Appeals below faithfully applied. The question whether any given case meets a well-settled standard obviously does not warrant this Court's attention. Such a case-specific inquiry is even less justified where, as here, petitioners failed to raise the issue below. In any event, the Court of Appeals found that the appropriate standard had been met and the Supreme Court of Ohio concurred. Further review would be a waste of judicial resources.

STATEMENT OF THE CASE

The underlying facts in this case are not before this Court since petitioners did not appeal the unanimous lower court rulings in respondent's favor on the liability issues. Briefly, respondent David Kuntz, a former city employee, was hired by the City of Cincinnati Health Department as a project administrator under a series of contracts for the period from June, 1968 through June, 1973. In June of 1973, respondent Kuntz was granted civil service status with the City of Cincinnati and given the classification of business manager in the City Health Department.

On February 12, 1987, the City's Civil Service Commission granted Mr. Kuntz's request for civil service status

for the period from June 30, 1968, through June 2, 1973; determined that respondent was a "classified employee"; and ordered that his personnel record be changed to reflect "classified" civil service status. The City did not appeal the Commission's finding.

When respondent sought the retirement benefits, sick leave and vacation credit to which he was entitled as a civil service employee, the City refused his request. As a result, respondent filed a complaint seeking the benefits to which he was entitled under the Civil Service Commission decision. The City then requested reconsideration of the Civil Service Commission's decision. However, the Commission refused to alter its prior decision and denied the City's request for

reconsideration. The trial court then granted respondent all of the substantive relief that he sought. (Petitioners' Appendix 84A-86A.)

Upon respondent's motion, the lower court declined to award attorney fees pursuant to Section 733.61 of the Ohio Revised Code or 42 U.S.C. Section 1988. The Court of Appeals upheld the denial of attorney fees pursuant to Section 733.61 of the Ohio Revised Code but found that an award was proper pursuant to 42 U.S.C. Section 1988. The Ohio Supreme Court denied petitioners' request for discretionary review. The only issue presented to this Court is whether attorney fees should have been awarded pursuant to 42 U.S.C. Section 1988.

REASONS FOR DENYING THE WRIT

A. The Court of Appeals Correctly Held That Respondent Was Entitled to Attorney Fees Pursuant to 42 U.S.C. Section 1988 Where Respondent Prevailed on the Pendent State-Law Claim.

The petitioners request a Writ of Certiorari to review whether the Court of Appeals correctly awarded respondent attorney fees pursuant to 42 U.S.C. Section 1988 and Maher v. Gagne, 448 U.S. 122 (1980), and its progeny. It is clear from the record that the Court of Appeals properly awarded attorney fees. The court held that there was a "nexus" between respondent's state-law claims and constitutional claims and that such claims were "substantial."

Petitioners argue that respondent lost on the merits of his Section 1983 claim and that attorney fees must therefore be denied. (See Petition at 7 citing Raley v. Frazier, 747 F.2d 287 (5th Cir. 1984); Luria Bros. & Co. v. Allen, 672 F.2d 347 (3rd Cir. 1982); Reel v. Arkansas Department of Corrections, 672 F.2d 693 (8th Cir. 1952).) Although petitioners correctly summarize the law to be applied where a Section 1983 claim is lost, they have misstated the record in a way flatly contradicted by the findings of the Court of Appeals.

There is no disagreement that courts have consistently held that, where a plaintiff brings a state-law claim and a federal claim, and then fails on the federal claim, the plaintiff is not

entitled to attorney fees under 42 U.S.C. Section 1988. See, e.g., Maher v. Gagne, 448 U.S. at 133, n.5. That principle was recognized by the Court of Appeals here. However, the appellate court found that respondent had not failed on his Section 1983 claim, but, rather, that the lower court had not ruled upon it. Under these circumstances, a very different standard applies. In Maher, this Court reaffirmed the substantiality test recognized in Hagans v. Lavine, 415 U.S. 528 (1974); and United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Under this test, fees may be awarded under Section 1988 where the federal claim, though not ruled upon, is substantial and arises out of a "common nucleus of operative fact" with

the state law claim upon which the plaintiff prevailed.[1/]

The Court of Appeals applied this substantiality test here, citing its own earlier decision in Doe v. Cuddy, 21 Ohio App.3d 270, 487 N.E.2d 914 (Hamilton Cty. Ct. App. 1985); and Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977).

1/ Under the substantiality test, a federal claim is substantial unless "it is obviously without merit or ... its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy." Hagans v. Lavine, 415 U.S. 528, 537 (1974). The Court of Appeals cited this standard in addressing the substantiality issue here. (Petitioners' Appendix 55A.)

The Court found that both prongs of the substantiality test had been met. First, the Court noted that respondent's claims arose out of a "common nucleus of operative facts." (Petitioner's Appendix 58A.) Specifically, the City had denied respondent retirement benefits, sick leave and vacation credit although he was entitled to these benefits pursuant to the City's Civil Service Commission decision awarding him classified civil service status for the time period in question. Respondent alleged that he was denied property interests and benefits to which he was entitled without due process of law in violation of the 14th Amendment. Mr. Kuntz's state and federal claims both arose because of the City's failure to provide him with benefits to which he was entitled under the law.

Even petitioners do not dispute that the facts of the federal claim arose out of a common nucleus of operative fact with the state-law claim. Indeed, the facts underlying both the state law and federal constitutional claims were identical.

The Court of Appeals also found that respondent met the second prong of the test in that his federal claim was substantial. (Petitioners' Appendix 58A-59A.) In Board of Regents v. Roth, 408 U.S. 564 (1972), this Court recognized that "an individual has a constitutional property interest where there is a legitimate claim of entitlement to it." According to the Court,

> Property interests ... are created and their dimensions are defined by existing rules or understandings that

> stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlements to those benefits.

Board of Regents v. Roth, supra, 408 U.S. at 577.

Here, the trial and appellate courts held that City ordinances supported respondent's legitimate claim of entitlement to retirement benefits, sick leave and vacation credit. Clearly, this created a constitutionally protected property interest in these benefits. The denial of such benefits by the City was both procedurally and substantively infirm under both state and federal law.

In order to contrive a legal issue for review, petitioners repeatedly state that the trial court ruled against

respondent on his federal claim. (See Petition at 7-8.) This is simply not true. Conspicuously absent from the decisions of the trial court is any such ruling. To the contrary, the trial court granted respondent's motion for summary judgment and ordered all of the relief sought. In subsequently denying respondent's motion for attorney fees, the trial court merely stated:

> The court did not grant summary judgment to plaintiff on his alleged claims brought under 42 U.S.C. Section 1983; therefore, plaintiff is not entitled to an award of reasonable attorneys' fees pursuant to 42 U.S.C. Section 1988.

(Petitioners' Appendix 37A.) While the trial court noted that it did not grant relief on the basis of respondent's

federal claims, the court did not state that it denied those claims. In light of the fact that respondent could be (and was) granted all relief requested under his state law claims, there was simply no need to decide the constitutional claim. The trial court's action in deciding the non-constitutional claim first, so that a decision on the federal constitutional claim was not necessary, comports with general practice. See Hagans v. Lavine, 415 U.S. 528, 547 (1974).

Petitioners fail to acknowledge that they filed their own motion for summary judgment challenging respondent's right to recover under federal or state law. That motion was denied. (Petitioners' Appendix 39A.) Had the trial court decided that respondent's Section 1983 claim had no merit, as petitioners would

have this Court believe, petitioners' motion would have been granted, at least in part. The fact that their motion was denied in full belies petitioners' contention that the trial court affirmatively ruled against respondent on his federal claim.

Petitioners also argue that respondent is not entitled to attorney fees under Section 1983 since his state-law claim supposedly allowed for an award of fees. (Petition at 11.) Once again, petitioners have erred. It is quite clear that respondent's state-law claim did not allow for attorney fees. Mr. Kuntz sought a declaratory judgment and injunctive relief relating to benefits arising under the Cincinnati Municipal Code. However, neither the municipal code nor state law provides for

an award of attorney fees to an employee deprived of benefits vested under state or local law. Respondent sought fees under Ohio Revised Code Section 733.59, which permits an award of attorney fees in a proper taxpayer action. However, both the trial and the appellate courts held that respondent did not fall within the jurisdiction of the taxpayer statute. Thus, while respondent sought attorney fees under the taxpayer statute, the substantive state-law claims did not arise, nor were they resolved, under that statute.

B. The Decision of the Court of Appeals is in Accordance With Maher v. Gagne and 42 U.S.C. Section 1988.

As noted above, petitioners have repeatedly argued that respondent was not entitled to attorney fees because he had lost his Section 1983 claims. Finding no

success with that argument, petitioners now argue, for the first time to this Court, that respondent's Section 1983 claim was not substantial[2/] and that

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2/ Curiously, even now petitioners fail to articulate any basis for their challenge to respondent's Section 1983 claim. All they argue is that respondent failed to prove official policy. (Petition at 14, n 1.)

However, the pleadings themselves, without even having to turn to the evidence, resolve this issue. For example, petitioners admitted the allegation that the City's Retirement Board is responsible for the general administration of the retirement system (Amended Complaint ¶ 3; Answer ¶ 2.) More particularly, petitioners admitted that the Retirement Board had "final authority" when it "exercised its authority" to deny benefits to Mr. Kuntz. (Eighth Defense, Answer ¶ 38.) Petitioners also admitted that they "at all times acted in their official capacities with legal justification and/or excuse." (Seventeenth Defense, Answer ¶ 47.) Thus, even this paltry effort to establish lack of substantiality ignores petitioners' own admissions.

the Ohio courts are somehow in conflict with other state court decisions. Clearly, petitioners should not be permitted to raise these issues for the first time to this Court. Delta Airlines v. August, 450 U.S. 346, 362 (1981) (question presented in petition but not before Court of Appeals is not properly before the Supreme Court).

Although petitioners claim that there is a conflict among the state courts, no such conflict exists. As Justice Powell noted in his concurring opinion in Maher, once a federal claim is found to be substantial, it is not necessary to look behind that decision to further evaluate the constitutional claim. 448 U.S. at 134. In fact, to do so would put the court in the business of rendering advisory opinions. To avoid

this burden, the Hagans standard (see footnote 1) has been consistently followed.

Finally, even a cursory examination of the petitioners' theory that three lines of cases exist among the state courts shows that it is misguided. Virtually every court that has discussed the issue applies the substantiality test, just as the Court of Appeals did in the present case.

Petitioners cite only one state court decision to support their claim that there is a line of cases that requires plaintiffs to show that their Section 1983 claim is "meritorious." (See Petition at 13, citing Gumbhir v. Kansas State Board of Pharmacy, 646 P.2d 1078 (Ka. 1982).) However, in Gumbhir, the plaintiff had not even pleaded a

Section 1983 claim. In deciding to nonetheless consider the plaintiff's Section 1988 claim for fees, the court discussed and followed both Maher v. Gagne, 448 U.S. 122 (1980); and Seals v. Quarterly County Court, 562 F.2d 390 (6th Cir. 1977). (See 646 F.2d at 1086.) The court then denied fees because "the state claim upon which Gumbhir prevailed below did not involve a common nucleus of operative facts with a substantial federal claim." 646 P.2d at 1090.

Similarly, petitioners' claim that there is a line of cases holding that attorney fees should not be granted if there is an adequate remedy under state law (Petition at 13) is equally inaccurate. Petitioners cite only two cases in support of this theory. Roberts v. Mills, 628 P.2d 714, 715 (Or. 1981),

involved a Section 1983 claim that the court held was "superfluous." Later, the Court of Appeals in Lofft v. State Board of Higher Education, 89 Ore. App. 614, 750 P.2d 515 (1987), explained the Roberts decision, noting that the complaint included only a "bare reference" to Section 1983, essentially finding that the claim was not substantial. The court in Lofft then held that where an employee brought both a state-law claim and federal claim for wrongful termination, and then prevailed on the state-law claim, he was entitled to attorney fees pursuant to 42 U.S.C. Section 1988. Lofft v. State Board of Higher Education, 89 Ore. App. 614, 89 Ore. App. at 616-617; 750 P.2d at 516.

Gonzalez v. New Mexico Educational Retirement Board, 788 P.2d 348 (N.M.

1990), also relied upon by petitioners, likewise lends no support to their cause. There the court held that plaintiffs' suit "at bottom was to interpret and apply" agency rules "to determine their validity in light of the governing state statutes." Gonzalez v. New Mexico Educational Retirement Board, 788 P.2d 348, 351 (1990). Once again, there was simply no substantial federal issue before the court.

On the other hand, this case clearly presents a substantial federal claim, as the Court of Appeals held. Moreover, respondents should not be permitted now, for the first time, to question the substantiality of respondent's federal claim or to urge a standard other than that required by Hagans and Maher when they failed to do so below.

The Ohio courts here followed relevant Supreme Court decisions and settled law in deciding that respondent is entitled to an award of attorney fees. Furthermore, there are no conflicts among the state courts to be resolved and no outstanding questions to be answered.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Andrew S. Lipton
(Counsel of Record)
Manley, Burke, Fischer & Lipton
225 West Court Street
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

Attorney for Respondent

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